Supreme Court, U.S.
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No. 92-126

In the Supreme Court of the United States

OCTOBER TERM, 1992

BBCA, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction to consider petitioner's appeal from the dismissal of its complaint.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 954 F.2d 1429. The order of the district court (Pet. App. 15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1992. The petition for rehearing was denied on March 18, 1992 (Pet. App. 11a). The petition for a writ of certiorari was filed on June 16, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner asserts (Pet. 3) that it is a church incorporated under Minnesota law. The Internal Revenue Service filed liens against parcels of real property ostensibly owned by the church to satisfy tax penalty assessments made against two of its organizers, James and Joan Noske, on the theory that the church is the alter ego of the Noskes.[1] Petitioner filed a complaint in the district court seeking to quiet title to the property encumbered by the liens (Pet. App. 2a). On November 26, 1990, after repeated warnings and the imposition of lesser sanctions, the court dismissed the complaint pursuant to Rule 37(b) of the Federal Rules of Civil Procedure due to petitioner's willful abuse of the discovery process (Pet. App. 3a). The judgment stated that "Defendant's motion to dismiss for failure to cooperate in discovery is GRANTED." *Ibid.*

2. On December 10, 1990, noting that the judgment did not specify that the dismissal was with prejudice, the government filed a motion to amend or alter the judgment "pursuant to Rules 59(e) and 60(a) of the Federal Rules of Civil Procedure" (Pet. App. 12a-14a). In this motion, the government stated that the judgment operated as a dismissal with prejudice by virtue of Rule 41 of the Federal Rules of Civil Procedure and, to eliminate any possible confusion, the judgment should therefore explicitly dismiss the complaint with prejudice (Pet. App. 12a-13a). On December 18, 1990, the district court granted the motion and entered a judgment explicitly dismissing the case with prejudice (Pet. App. 15a).

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[1] Section 6700 of the Internal Revenue Code provides penalties for the promotion of abusive tax shelters. 26 U.S.C. 6700.

On December 26, 1990, petitioner filed a motion to reconsider the dismissal with prejudice (Pet. App. 4a). The district court denied this motion in an order dated February 1, 1991 (*ibid.*). On February 14, 1991, petitioner filed a notice of appeal (*id.* at. 16a).

3. The court of appeals held that it lacked jurisdiction to consider the merits of the order dismissing the complaint because the notice of appeal was not filed within 60 days of the November 26, 1990, judgment. See Fed. R. App. P. 4(a)(1). The court of appeals further noted that it *did* have jurisdiction to review the December 18, 1990, order that specified that the dismissal was with prejudice, but found that the insertion of the words "with prejudice" in the second order did not present a "true controversy" because a reversal of the order would not affect the outcome of the appeal (Pet. App. 10a n.6). This is because the original judgment, as well as the amended judgment, had the same effect—"the dismissal would still be with prejudice" (*ibid.*).

The court stated (Pet. App. 4a-6a) that the critical jurisdictional issue was whether the government's motion to amend the judgment was a Rule 59(e) motion (which would have extended the time for taking an appeal from the order on the merits) or a Rule 60(a) motion to correct a clerical error (which would *not* have extended the time for taking an appeal from the original judgment). The court concluded (Pet. App. 8a) that the government's motion fell under Rule 60(a), not under Rule 59(e), because the motion did not seek a substantive change in the original judgment. Both the original judgment and the amended judgment effected a dismissal with prejudice under Rule 41(b) of the Federal Rules of Civil Procedure (Pet. App. 7a). The government's motion sought only to make express what the judgment had left implied (*ibid.*).

ARGUMENT

The court of appeals correctly held that it lacked jurisdiction to review the merits of the judgment dismissing the complaint in this case. The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. As this Court stated in *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-212 (1952) (footnotes omitted),

> the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. * * * The question is whether the lower court in its second order has disturbed or revised legal rights and obligations which, by its prior judgment had been plainly and properly settled with finality.

The appeal was untimely in this case because the second judgment entered by the district court did not alter or affect the legal rights of the parties that were established by the prior judgment. As the court of appeals observed (Pet. App. 7a & n.4), the original judgment already effected a dismissal *with prejudice* of the complaint pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. See *Stebbins* v. *State Farm Mutual Automobile Insurance Co.*, 413 F.2d 1100, 1102 (D.C. Cir. 1969) (order dismissing case for discovery abuse under Rule 37 that is silent as to its effect is a dismissal with prejudice under Rule 41(b)); *Nasser* v. *Isthmian Lines*, 331 F.2d 124, 127 (2d Cir.

1964) (same). Because the second judgment did not alter the legal rights of the parties established by the prior judgment, it did not extend the time for appeal from the merits of that judgment. See *LeBeau* v. *Taco Bell*, 892 F.2d 605, 608 (7th Cir. 1989) (entry of order specifying that previously silent judgment was a dismissal with prejudice did not affect time for appeal from merits of original decision).[2]

2. The distinction between material and immaterial alterations in a judgment delineated by this Court in *Minneapolis-Honeywell Regulator Co.* determines the character of postjudgment motions in the district courts.[3] See *St. Paul Fire & Marine Ins. Co.* v. *Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). Motions filed within ten days of the entry of judgment that seek substantive changes in the judgment are generally characterized as Rule 59(e) motions, and therefore extend the time for ap-

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[2] Petitioner's suggestion that the second judgment resolved a "genuine ambiguity" in the original judgment (Pet. 12) is without merit. Both the district court and the court of appeals (Pet. App. 7a) determined that the second judgment merely made express what the first judgment had left implied.

[3] The distinction between material and immaterial changes in a judgment is also reflected in this Court's practice. Rule 13.4 of the Rules of this Court provides that the timely filing of a petition for rehearing extends the time for filing a petition for a writ of certiorari until the petition for rehearing is denied or the court of appeals enters a subsequent judgment. As this Court has recently emphasized, however:

> The practice does not extend to petitions for rehearing seeking only to correct a formal defect in the judgment or opinion of the lower court. In such cases, * * * "no . . . alteration of the rights [is] asked, and the finality of the court's first order [is] never suspended."

Missouri v. *Jenkins*, 495 U.S. 33, 45 n.13 (1990) (quoting *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942)).

peal.[4] See, *e.g.*, *Lopez* v. *Corporacion Azucarera de Puerto Rico*, 938 F.2d 1510, 1513 (1st Cir. 1991) ("a motion which ask[s] the court to modify its earlier disposition of a case because of an allegedly erroneous legal result is brought under Fed. R. Civ. P. 59(e)") (quoting *Appeal of Sun Pipe Line Co.*, 831 F.2d 22, 24 (1st Cir. 1987), cert. denied, 486 U.S. 1055 (1988)); *Harcon Barge Co.* v. *D & G Boat Rentals, Inc.*, 784 F.2d 665, 669 (5th Cir.) (en banc) (motions to correct errors of a substantial nature that are filed within ten days of the entry of judgment are Rule 59(e) motions), cert. denied, 479 U.S. 930 (1986); *Charles* v. *Daley*, 799 F.2d 343, 347 (7th Cir. 1986) (same); *United States* v. *Real Property & Residence*, 920 F.2d 788, 791 n.3 (11th Cir. 1991) ("Rule 59(e) applies to motions to alter or amend some substantive aspect of the judgment."). Conversely, motions filed within ten days of the entry of judgment that seek immaterial changes in the judgment are characterized as Rule 60(a) motions, and therefore do not extend the time for appeal from the merits. *Harcon Barge Co.* v. *D & G Boat Rentals, Inc.*, 784 F.2d at 667-669; *Charles* v. *Daley*, 799 F.2d at 347; *Miller* v. *Transamerican Press, Inc.*, 709 F.2d 524, 527 (9th Cir. 1983); *St. Paul Fire &*

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[4] This principle does not apply when the motion raises an issue that is collateral to the merits. See *Buchanan* v. *Stanships, Inc.*, 485 U.S. 265, 269 (1988) (motion for costs filed within ten days of the entry of judgment is not a Rule 59(e) motion); *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445, 451-455 (1982) (motion for attorney's fees filed within ten days of entry of judgment is not a Rule 59(e) motion). Cf. *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 175 (1989) (motion for pre-judgment interest filed within ten days of entry of judgment is a Rule 59(e) motion because the issue raised is not collateral to the merits).

Marine Ins. Co. v. *Continental Casualty Co.*, 684 F.2d at 693.[5]

This distinction reflects the different purposes of the two rules. Rule 59(e) was adopted to address the situation in *Boaz* v. *Mutual Life Ins. Co.*, 146 F.2d 321, 322 (8th Cir. 1944). See *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445, 450 (1982). In *Boaz*, the district court had entered a judgment dismissing a case without prejudice. Two days later, the defendant filed a motion requesting the court to dismiss the case with prejudice. The district court granted the motion. The court of appeals confirmed that the district court retained jurisdiction to effect this material change in the judgment even though no provision explicitly so provided. Rule 59(e) was adopted explicitly to empower district courts to effect material changes in the judgment. See *Miller* v. *Transamerican Press, Inc.*, 709 F.2d 524, 527 (9th Cir. 1983) ("The history of Rule 59(e) shows that 'alter or amend' means a substantive change of mind by the court.").[6] Rule 59, however, does not empower

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[5] As the court of appeals observed (Pet. App. 6a), in determining the character of the motion, substance, and not nomenclature, is controlling. Cf. *Buchanan* v. *Stanships, Inc.*, 485 U.S. 265, 269 (1988) (designation of request for costs as a Rule 59(e) motion not determinative).

[6] Petitioner errs in asserting (Pet. 14) that the present case conflicts with *Boaz*. In *Boaz*, the district court had explicitly dismissed the case without prejudice. Consequently, when it entered a second judgment dismissing the case with prejudice, the court altered the legal rights of the parties. See also *Bank of California, N.A.* v. *Arthur Andersen & Co.*, 709 F.2d 1174, 1175-1176 (7th Cir. 1983) (motion seeking to transform judgment dismissing count with prejudice into dismissal without prejudice was a proper Rule 59(e) motion). In the present case, the original judgment—which was silent as to its effect—already effected a dismissal with prejudice under Federal Rule of Civil Procedure 41(b). The motion filed by the government

courts to correct errors of a non-substantive nature; that authority is separately provided by Rule 60(a). *Miller* v. *Transamerican Press, Inc.*, 709 F.2d at 527. See also *Harcon Barge Co.* v. *D & G Boat Rentals, Inc.*, 784 F.2d at 669 ("Rule 60(a), providing for the correction of clerical errors, limits the otherwise unrestricted scope of Rule 59(e)."). Because the government's motion did not request a substantive alteration in the original judgment, the court of appeals properly determined that the motion was not filed pursuant to Rule 59(e).[7]

3. The asserted conflict (Pet. 16) among the courts of appeals concerning the distinction between Rule 59 and Rule 60 motions has no relevance to this case. The cases on which petitioner relies all involve motions that sought *substantive* changes in the original judgment.[8] The issue before the courts was whether

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—unlike the motions in *Boaz* and *Bank of California, N.A.*—did not request an alteration in the legal rights of the parties.

[7] Petitioner's reliance (Pet. 5) on the fact that the clerk's office informed it that the appeal was "timely and not premature" is misplaced. As the court of appeals recognized (Pet. App. 4a n.2), the ultimate responsibility for determining jurisdiction rests with the court, not with the clerk. Moreover, the clerk's letter (Pet. App. 23a) did *not* address whether petitioner filed a timely notice of appeal from the judgment on the merits. Instead, the letter informed petitioner that the appeal was not premature because petitioner's then-pending Rule 60(b) motion in the district court to vacate the judgment —unlike a pending Rule 59(e) motion—did not destroy appellate jurisdiction. See Fed. R. App. P. 4(a)(4). It is apparent, in any event, that petitioner did not rely on the clerk's advice: the time for filing a notice of appeal from the judgment on the merits had already expired when petitioner received that letter.

[8] In *Teal* v. *Eagle Fleet, Inc.*, 933 F.2d 341 (5th Cir. 1991), the plaintiffs filed a motion for reconsideration from an order denying their motion to set aside a settlement agreement. In

the motion was properly characterized as a Rule 59(e) motion or as a Rule 60*(b)* motion (seeking relief from the judgment in the case of mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, and the like). See 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2854, at 149 (1973) (Rule 60(a) "deals solely with the correction of errors that properly may be described as clerical * * *. Errors of a more substantial nature are to be corrected by a motion under Rules 59(e) or 60(b).").

The present case involves a motion that sought a nonsubstantive, clerical correction in the judgment. The courts of appeals have uniformly concluded that such motions are Rule 60(a) motions that do not suspend the running of the time for appeal. *Harcon Barge Co.* v. *D & G Boat Rentals, Inc.*, 784 F.2d 665, 668-669 (5th Cir.) (en banc), cert. denied, 479 U.S. 930 (1986); *Charles* v. *Daley*, 799 F.2d 343, 347 (7th Cir. 1986); *Miller* v. *Transamerican Press, Inc.*, 709 F.2d 524, 527 (9th Cir. 1983); *St. Paul Fire & Marine Ins. Co.* v. *Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The court of appeals correctly applied that settled distinction in this case.

Vreeken v. *Davis*, 718 F.2d 343 (10th Cir. 1983), the motion requested that the court set aside its order of summary judgment in favor of the defendant. In *Bank of California, N.A.* v. *Arthur Andersen & Co.*, 709 F.2d 1174 (7th Cir. 1983), the motion requested the court to modify an order dismissing a claim with prejudice to dismiss the claim without prejudice. Finally, in *Finch* v. *City of Vernon*, 845 F.2d 256 (11th Cir. 1988), the motion sought reconsideration of a judgment that had found the defendant jointly and severally liable with other defendants for civil rights violations. As the court observed, this motion "raised * * * a substantive issue." *Id.* at 259.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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